

Tyndall AFB Preventive Law Program Series

Legal Assistance Series

FLORIDA PROBATE

This handout contains basic information. If you have specific questions, come in to see a Judge Advocate for legal assistance.



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PROBATE

WHAT DOES "PROBATING A WILL" MEAN?

"Probating a will" means taking all the legal steps necessary to assure a will is valid and to admit the will to probate.

WHAT DOES "PROBATING AN ESTATE" MEAN?

Probate is a legal process provided for by Florida law which determines the value of a deceased person's property and its distribution to its heirs. Probate proceedings take place in the circuit court of the county where the deceased property owner lived or maintained his or her usual place of dwelling.

If there is property in the name of the deceased located in another state, additional proceedings may be necessary in that state.

WHAT DOES "ESTATE" MEAN?

For probate purposes, "estate" means all property of a deceased person that is the subject of probate. Some property which was owned jointly with right of survivorship or which passes to someone else by contract such as life insurance is not part of the probate estate. However, this property may be included in the deceased person's gross estate for federal estate tax purposes. If the value of the estate is over \$1,000,000.00, a federal estate tax return must be filed. See IRS Publication 559 for more information¹.

WHY IS PROBATE NECESSARY?

There is no natural right to inherit property. The right exists only as it is set by law. Florida law provides for probating of estates to protect all parties who have any interest in that estate.

An estate is probated for the following reasons:

1. To collect and determine the estate's assets;
2. To protect the estate's assets;
3. To provide a method of converting assets to cash to distribute to beneficiaries or to pay creditors;
4. To pay debts and taxes, and to terminate claims against the deceased person or the estate which are not timely presented
5. To determine who is entitled to share in the estate and to distribute the property to the proper parties;

6. In the case of real estate and other property with recorded ownership, to legally transfer its ownership and maintain a clear chain of title to the property; and
7. To extend the court's protection to those involved in settling the deceased person's affairs and distributing his or her property.

Someone is required to step into the shoes of the deceased person, so to speak, and finally carry out the business of the estate, including paying the debts, taxes, and the expenses, and - in the end - seeing that the property is distributed to the rightful parties. Generally, in a formal probate proceeding, all those functions are carried out by someone called the personal representative, subject to review and approval by the circuit court.

Although formal probate procedure can be lengthy and detailed, it is provided for by law to assure that all of the property of the deceased is accounted for, and that all debts and taxes are paid. Florida does allow more simplified kinds of probate when certain conditions exist. These simplified proceedings may not require the appointment of a personal representative. Instead, those persons who are to finally receive the deceased person's property may perform certain functions without direct court review and approval.

WHAT DOES PROBATE INVOLVE?

Personal Representative: Probating an estate requires that a responsible party be named as personal representative to carry out the duties outlined here. This party may be an individual such as the deceased person's surviving spouse or an adult child, or it may be a qualified bank or trust company, or a lawyer. The personal representative may be named in the will. However, if the deceased dies without a will, a personal representative (usually a surviving spouse or someone selected by the next of kin) will be appointed by the circuit court to perform these functions. A person can serve as personal representative if he or she is either a Florida resident at the time of the decedent's death, or a relative of the decedent.

The functions and duties of the personal representatives are:

1. To take possession of, protect, and conserve all of the estate property except for the homestead and certain allowances to the surviving spouse and children;
2. To receive any rents and payments due the estate, including interest, dividends, claims, and notes;
3. To make proper demand and collect all debts, claims, and notes due;
4. To determine the names, ages, residence, and degree of relationship of all possible heirs or beneficiaries;
5. To determine debts and pay outstanding obligations, including proper determination of taxes due; and

6. To carry out the orders of the circuit court in all matters before the court, and to distribute the property to the proper parties.

In general, it is the personal representative's job to settle the affairs of the deceased in an orderly manner. This may require preparing and filing numerous legal documents, giving or publishing notices, holding court hearings, securing appraisals of property, preparing interim and final income tax returns (and possibly gift and estate tax returns), providing an accounting of funds, distributing the property, and obtaining the final discharge of the personal representative by the circuit court.

The Judge: All probate proceedings are under the jurisdiction of the circuit court of the county where the deceased resided. Proceedings are generally presided over by a circuit judge assigned to the estate. The court will issue the personal representative the Letters of Administration. These authorize the personal representative to probate the estate. The acts of the personal representative are subject to the judge's review and approval at the request of any interested person. Additionally, the personal representative may ask the judge to resolve any question concerning the estate or the probate process.

HOW LONG DOES PROBATE TAKE?

The problems in each estate vary. Therefore, no certain schedule can be given for the length of time needed to probate an estate. Generally, the final estate accounting and the petition for discharge of the personal representative must be filed and provided to all interested persons within 12 months after the issuance of Letters of Administration. If a federal estate tax return is due from the estate, the final accounting and petition for discharge must be filed within 12 months from the date the tax return is due. These time limits for closing estates may be extended by the court for good cause.

Barring complications, such as litigation or problems in transferring assets, an estate which is not required to file a federal tax return can be closed shortly after the time expires for filing creditors' claims (which is three months from the first publication of a notice of probate administration in a local newspaper).

In estates where simplified methods of probate administration are available, less time may be required to finish probating the estate. Also, if at any time during probate the estate assets consist entirely of exempt personal property and/or homestead property, the court may order immediate distribution of the assets and close the estate.

FEES, COSTS AND TAXES

In most estates, the primary expenses of probate are compensation of the personal representative, attorneys, appraisers, accountants, and other professionals whose services may be required in administering the estate. Other expenses include court costs, publication fees, costs of distributing tangible personal property, and, of course, ordinary property management expenses which the deceased would have incurred while alive (such as maintenance expenses on real property).

Compensation of the personal representative and any other professionals is set out by statute. If the value of the estate is less than \$1 million, the personal representative will receive 3% of the value of the estate. The court can increase or decrease this amount for various reasons. In addition, the court may allow further compensation for extraordinary services (for instance, conducting litigation on behalf of the estate). Ordinarily, attorneys' and other professionals' fees are agreed upon between the personal representative and the professional. However, any interested person may ask the court to review the amount of any compensation paid by the estate and determine whether it is reasonable. Florida law gives guidelines for determining reasonable compensation.

In rare instances, the deceased's may specify the amount of compensation payable to the personal representative. If the will has such a provision, the personal representative may either accept the amount provided for, or renounce the provision and accept statutory compensation instead. Likewise, personal representatives may renounce their right to all or any part of the compensation. When an attorney serves as personal representative and also performs legal work for the estate, he or she is entitled to compensation both for legal services and for services as personal representative.

The federal estate tax, if it is due, is generally the largest estate expenditure. This tax is fixed by the Internal Revenue Code. The state is allowed, and does impose, a tax on the transfer of the assets of a deceased person who lived in Florida. However, the amount of tax imposed by the state does not increase the estate's overall tax burden. This is because the amount of state tax is an allowable credit against the federal estate tax. If a deceased Florida resident owned property in other states which levy various estate taxes, Florida reduces its estate tax charge by the amount of any taxes paid to those other states.

JOINTLY OWNED PROPERTY

There are various forms of co-ownership of property. The two most common in Florida are tenancy by the entirety (where husband and wife own property jointly) and tenancy in common (where other persons own property jointly without right of survivorship, or where husband and wife jointly own property but it is specifically stated that their ownership is as tenants in common rather than tenants by the entirety). Under tenancy by the entirety, when the first spouse dies, the survivor immediately owns the property without further legal action. This is also true of a third form or co-ownership, joint tenancy with right of survivorship, even though the tenants may be unrelated.

When the surviving owner becomes the sole owner of real estate by operation of law and without further legal action, all that is necessary to show record title in the survivor is the recording of proof of death in the public records of the county where the property is located. In addition, it should be recorded that all federal and state estate taxes have been paid or that there are no taxes due. In the case of jointly owned tangible personal property (such as automobiles and other titled personal property), title may be transferred to the surviving owner by showing proof of death. Intangible personal property (such as stocks or bank accounts) may be transferred to the surviving owner by presenting proof of death to the transfer agents with instructions as to future

dividend or interest payments.

When a deceased person owned property with another person as tenants in common, the deceased owner's interest must be probated just as any asset owned by the deceased alone.

ALTERNATIVES TO FORMAL ADMINISTRATION

Probate of an estate may be simplified or dispensed with in certain cases. There are two alternatives to formal administration. These are known as Summary Administration and Disposition Without Administration.

Summary Administration: This is available when the value of the estate subject to probate in Florida (excluding property which is exempt from the claims of creditors) is not more than \$75,000² or the deceased has been dead for more than two years. Also, if the deceased left a will, it must not state that formal administration of the estate is required. Generally, a petition for Summary Administration must be signed by any surviving spouse and the heirs at law or beneficiaries. If there is a will, it must be proved and admitted to probate. After any required hearing, the judge may sign an order of Summary Administration, and the assets can be immediately distributed to the persons entitled to them.

Under Summary Administration, the deceased person's estate and the persons who receive the estate assets remain liable for claims against the deceased for two years after the date of death, or longer if proceedings were begun to enforce a claim within those two years. However, in a Summary Administration, the two year period may be greatly reduced by publication of an appropriate notice in a local newspaper. In a Family Administration, the two year period may be reduced by using formal administration until all claims or creditors have been barred or provision for payment has been made.

Disposition Without Administration: This alternative is available when estate assets consist solely of the following:

1. Exempt personal property (as defined by law and the Florida Constitution); and/or
2. Non-exempt personal property, the value of which does not exceed the sum of the amount of preferred funeral expenses and reasonable and necessary medical and hospital expenses of the last 60 days of the last illness.³

Any interested person may informally apply to the court for Disposition Without Administration by affidavit, letter, or otherwise. The court clerk can assist a person seeking Disposition Without Administration. If the judge is satisfied the estate is eligible for Disposition Without Administration, the judge will issue a letter or other written order authorizing immediate distribution of the deceased's property to the persons entitled to receive it.

WHY HAVE A WILL?

Florida law does not require you to make a will but it is usually best for a property owner to have

a will. It will assure you and those concerned that, when you die, your property will be disposed of as you desire. You may also name in your will the person who will administer your estate, and guardians and trustees to provide for the needs of minor children.

You can also make special provisions for adult members of your family or for disabled children, and make charitable bequests in your will. Estate taxes may also be substantially reduced by a properly drawn will. You may provide in your will for a separate document that indicates who should receive certain items of personal property, such as jewelry or furniture. (If you do not have a will, such a list is not legally enforceable.) In your will, you may also leave specific directions for dealing with any interest you have in a business.

WHAT IF YOU DO NOT HAVE A WILL?

Without a will, the laws of the state in which you are a resident at the date of your death will determine who receives your property, who administers your estate, and who becomes the guardian of your minor children. If you do not leave a will and you die a Florida resident, the law requires your property to be distributed as discussed below, depending upon who your nearest surviving relatives are:

Surviving spouse and/or lineal descendants

If your spouse survives you, and you have no children or other lineal descendants who survive you, your spouse will receive your entire estate.

If you are survived by a spouse and lineal descendants all of whom are also lineal descendants of your spouse, your spouse will receive the first \$60,000⁴ of your estate plus one-half of the rest of your estate.

If you are survived by a spouse and lineal descendants at least one of whom is not also a lineal descendant of your spouse, then your spouse will receive one-half of your estate.

The part of your estate which does not pass to your spouse (or your entire estate if you are not survived by a spouse) will be inherited by your lineal descendants. Each of your children (or, in place of a deceased child, the child's lineal descendants) will receive an equal share of your estate.

The foregoing provisions are subject to exemptions for homestead property, certain exempt personal property, and a statutory allowance to your surviving spouse and any lineal descendants or ascendants whom you were obligated to support or were in fact supporting.

Homestead property would be treated in the same manner as other property unless you are survived by a spouse and lineal descendants. In that case, your spouse would have the right to use the homestead for life, and your lineal descendants would receive the homestead property upon your spouse's death. (Homestead means one-half acre of contiguous land occupied as a residence by the decedent or his family at the time of death, if located within a municipality; or, if located outside a municipality, 160 acres of contiguous land and any improvements, owned by a natural

person. However, if you and your spouse owned the property as tenants by the entirety, it is not treated as homestead under these laws, and your surviving spouse would be entitled to the property without any probate and without remaining interest being owned by your descendants.)

No surviving spouse or lineal descendants

If you die unmarried and with no lineal descendants surviving, your surviving parents will receive your real and personal property. If neither parent survives you, then your brothers and sisters, or the descendants of any deceased brother or sister, will receive your property in equal shares, one share for each brother or sister.

If no parents, brothers, sisters, or descendants of any of them survive you, then your estate will be divided equally between your paternal and maternal relatives, in the following order of priority as to each side of the family:

1. to your surviving grandparents;
2. if neither grandparent survives you, in equal shares to your uncles and aunts or the descendants of any deceased uncle or aunt, one share for each aunt or uncle; and
3. if only maternal relatives or only paternal relatives survive you, to those relatives in the order stated above.

If you have neither maternal nor paternal relatives who survive you, then your entire estate will be inherited by the relatives of your last deceased spouse as if your spouse had survived you and then died without leaving a will. If none of the foregoing persons survive you, then your property will go to the state of Florida.

If you have further questions regarding this matter you may contact your Base Legal Assistance Officer.

¹ <http://www.irs.gov/pub/irs-pdf/p559.pdf>

² Fla. Stat. ch. 735.201 (2002)

³ Fla. Stat. ch. 735.301 (2002)

⁴ Fla. Stat. ch. 732.102 (2002)